FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 20, 2011

BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2011-116-R
v.	:	Citation No. 6670850; 11/09/2010
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2011-117-R
MINE SAFETY AND HEALTH	:	Order No. 6670851; 11/09/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Willow Lake Portal
	:	Mine ID: 11-03054
PEABODY MIDWEST MINING LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. LAKE 2011-118-R
v.	:	Citation No. 6670852; 11/09/2010
	:	
SECRETARY OF LABOR	:	Docket No. LAKE 2011-119-R
MINE SAFETY AND HEALTH	:	Order No. 6670853; 11/09/2010
ADMINISTRATION, (MSHA),	:	
Respondent	:	Mine: Air Quality #1 Mine
	:	Mine ID: 12-02010

DECISION

Appearances: Daniel W. Wolff, Esq., Crowell & Moring, LLP, Washington, District of Columbia for Peabody Midwest Mining LLC

Samuel Charles Lord, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for the Secretary of Labor

Before: Judge Andrews

These cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ("the Act").

These cases are before me upon Notices of Contest filed by the Contestants on November 11, 2010. Although the notices informally requested an expedited hearing, a separate formal motion for expedited proceedings under section 2700.52 of the Commission Rules was also filed on November 12, 2010. The motion was granted on November 24, 2010.

The Order of November 24, 2010, also consolidated Docket Nos. Lake 2011-116-R, 117-R, 118-R, and 119-R, involving two mines controlled by Peabody Energy (Peabody"). The hearing on these Dockets was held in Jeffersonville, Indiana, on December 14, 2010.

By agreement of all parties, additional Part 50 audit contest cases involving mines controlled by Massey Energy Company were heard in Charleston, West Virginia, on December 16, 2010. A separate decision will be issued for those Dockets.

PRELIMINARY MATTERS

On December 17, 2010, a request for intervention in the Willow Lake Portal ("Willow") case was received from the Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers Local S-8 of Harrisburg, Illinois. Since the hearing had been held, limited intervention in form of a memorandum to be filed no later than December 31, 2010, the date for submission of post hearing briefs, was granted. However, no submission was received from the intervenor.

A Memorandum for District Managers regarding Part 50 Audit procedures for safeguarding personally identifiable medical or other sensitive information was admitted as Exhibit G-5, but the document did not bear a date. The Secretary of Labor ("Secretary") later reported that the document had been distributed on December 13, 2010.[1]

At the hearing, the Secretary moved for admission of the notes made by the inspector on November 9, 2010, at each of the mines. These notes had been referred to in the testimony of a witness, Mr. Peter J. Montali. After reviewing the notes, Contestants objected to their admission. By Order dated December 21, 2010, the notes were admitted. Ex. G-16, 17. On January 14, 2011, Contestants filed a motion for reconsideration of the decision to admit the Inspector's notes, or in the alternative to strike section four of the Secretary's Post Hearing Brief. The section referred to mentions the notes, along with other matters regarding time for abatement of the citations issued. Since the notes were recorded by the inspector at the times that the citations and orders were issued on November 9, 2010, they are relevant. While the notes are hearsay, they are admissible. The motion in the alternative is denied.

The parties reported stipulations at the hearing, recited for the record, and summarized as follows:

1. Both Big Ridge, Inc., and Peabody Midwest Mining, LLC, are properly within the jurisdiction of the Federal Mine Safety and Health Review Commission.
2. The citations and orders and the modifications to the citations and orders were issued

[1] This information was provided by Counsel for the Secretary on the record at the hearing held on December 16, 2010 in Charleston, West Virginia. See transcript, pg. 12 for Docket Nos. WEVA 2011-398R, 399 R, 402R and 403R, 540R, 541R; and KENT 2011-255R, 256R, 305R, 306R. The date of distribution was again reported in an email from counsel on December 21, 2010. All of the mines involved in both of the hearings received superseding letters requesting the contested information. Separate hearings were held due to the distant locations of these groups of mines, but for all major purposes, counsel treated them all as one large, related case.

by an authorized representative of the Secretary to an agent of Big Ridge, Inc., and to an agent of Peabody Midwest Mining, LLC.

3. That various pieces of correspondence between the Secretary and Big Ridge, Inc., and Peabody Midwest Mining, LLC, including the October 20, 2010 request letters and the superseding October 28, 2010 request letters, and the responses from Ms. Mitchell-Bromfman, were authentic. There was no stipulation as to the truth of the matters asserted in such correspondence.

BACKGROUND

In October 2010, the Mine Safety and Health Administration ("MSHA") began a nationwide initiative to conduct thirty-nine (39) compliance audits under the authority of 30 C.F.R Part 50. Ex. G-1, p.2, ¶8. Two subsidiary mines of the Peabody Energy Company ("Peabody"), Willow, and Air Quality #1 ("Air Quality") are a part of this initiative.

On October 19, 2010, each mine was presented with a letter dated October 8, 2010, not specifically addressed to the mine, requesting certain documents. Ex. C-A, Tr. 106, 128-129. Two of the five requests, forms 7000-1 and 7000-2, maintained by the safety department of each mine, were made available to the MSHA inspector. Ex. G-2, 3. However, both Health and Safety Managers objected to providing the other requests, which included payroll records, time sheets, and a number of medical records. Tr. 107-09, 128. The requests for these records were repeated at each mine the next day, October 20, 2010. Tr. 109, 129. The records were not released by either mine. No citations or orders were issued at that time.

The first request was superseded by an October 28, 2010 request letter addressed to each mine and in pertinent part is as follows:

> The Federal Mine Safety and Health Administration (MSHA) is conducting an audit to determine your mine's compliance with the injury and illness reporting regulations in 30 Code of Federal Regulations (CFR) Part 50. Pursuant to 30 CFR §50.41, MSHA is requesting certain records that are considered to be relevant and necessary to complete its audit.
>
> Please have the following information and documentation available for review by October 29, 2010. The documents should cover the period beginning July 1, 2009 through June 30, 2010.
>
> 1. All MSHA Form 7000-1 Accident Reports
>
> 2. All quarterly MSHA Form 7000-2 Employment and Production Reports
>
> 3. All payroll records and time sheets for all individuals working at your mine for the covered time period

4. The number of employees working at the mine for each quarter

5. All medical records, doctor's slips, worker compensation filings, sick leave requests or reports, drug testing documents, emergency medical transportation records, and medical claims forms in your possession relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for all individuals working at your mine for the period of July 1, 2009 through June 30, 2010.

"In your possession" means within your mine's possession or within the control, custody, or possession of another entity or person from whom you have authority to obtain the required records. If any of the required records are in the exclusive possession of any other entity or person from who you do not have authority to obtain the required records, you must so certify and identify the entity or person who has exclusive possession. Ex C-D, C-E.

Since the content of the October 28, 2010 audit request letters is identical, they will be referred to as the Uniform Audit Request ("UAR").

Peabody's Senior Counsel responded by letters dated October 28 and 29, 2010, that the information listed in categories three (3) and five (5) would not be made available for MSHA's review. There was an indication that Peabody would welcome further discussion with MSHA, but conditioned such discussion on MSHA's cooperation in furnishing information regarding how the record demands could be narrowed to accommodate MSHA's legitimate audit concerns without jeopardizing privacy rights of employees or revealing confidential business information. There is no evidence that the information requested by Peabody as a condition for further discussion was provided by MSHA. Ex. C-F, C-G.

On November 9, 2010, MSHA inspectors went to the Willow and Air Quality mines to review the documentation requested in the UAR. Ex. G-16, G-17. Both mines refused to provide any medical records. A 104(a) citation was issued to each mine based on the refusal. Ex. G-10, 11. The request was repeated and again refused, and a 104(b) order was issued fifteen (15) minutes after the initial citations. Ex. G-12, 13. The citations were later modified to include the time sheets and payroll records. Ex. G-14, 15. An unopposed motion to amend the citations to include the timesheets and payroll records was granted.

Citation No. 6670850 was issued at Willow with the following notations:

Mike Baize, Safety Director, refused to permit an Authorized Representative of the Secretary of Labor to inspect and copy information to determine compliance with the reporting requirements related to accidents, injuries, or illnesses at the Willow Lake Mine (Mine ID 1103054). The requested documents include

medical records. (Sic) Doctor's slips, worker compensation filings, sick leave request or reports, emergency medical claims forms relating to accidents, injuries, or illnesses that occurred at the mine or may have resulted from work at the mine for the period currently being audited (07/01/2009 – 06/30/2010). MSHA considers this information relevant and necessary to determine compliance with the reporting requirements of 30 CFR, Part 50.

Order No. 6670851 was issued fifteen (15) minutes later with the following notations:

Todd Grounds, Compliance Manager, continued to refuse to provide records requested by an Authorized Representative of the Secretary identified in citation 6670850 for the purpose of conducting a Part 50 Audit at the Willow Lake Potal (Sic) Mine (Mine ID 11-03054) in accordance with the requirements of 30 CFR, Part 50.41.

At Air Quality, Citation No.6670852 and Order No. 6670853 were issued, and were essentially the same with the exception of the name of the mine and the employee served.

Peabody timely contested the citations and orders for both mines.

The record also contains evidence from officials at Willow that some miners objected to the release of medical and workers compensation files. Ex. C-J, Tr. 111, 112, 134. Cross examination of Michael Middlemas, Manager of Health and Safety at Air Quality, revealed that the miners were told only of the citation, and not that the audit was limited to workplace injuries and illnesses and limited to a one year period. Tr. 139. Also noted is the intervention granted to the union, which was not pursued. Since the miners were not fully informed, and there is no intervention for consideration, this matter will not be further discussed.

LAW AND REGULATIONS

Section 103(a) of the Act states in pertinent part:

> Authorized representatives of the Secretary…shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards,…and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order or decision issued under this title or other requirements of this Act. 30 U.S.C. §813(a).

Section 103(h) of the Act states in pertinent part:

In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary ... may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary ... is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. 30 U.S.C. §813(h).

Section 103 (e) of the Act states in pertinent part:

Any information obtained by the Secretary ... under this Act shall be obtained in such a manner as not to impose an unreasonable burden upon operators, especially those operating small businesses, consistent with the underlying purposes of this Act. Unnecessary duplication of effort in obtaining information shall be reduced to the maximum extent feasible. 30 U.S.C. §813(e).

The purpose and scope of 30 C.F.R. Part 50 is found in section 50.1 and states:

This part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq., and sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721 et seq., and applies to operators of coal, metal, and nonmetallic mines. It requires operators to immediately notify the Mine Safety and Health Administration (MSHA) of accidents, requires operators to investigate accidents, and restricts disturbance of accident related areas. This part also requires operators to file reports pertaining to accidents, occupational injuries and occupational illnesses, as well as employment and coal production data, with MSHA, and requires operators to maintain copies of reports at relevant mine offices. The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under part 50, MSHA will develop rates of injury occurrence (incident rates or IR), on the basis of 200,000 hours of employee exposure (equivalent to 100 employees working 2,000 hours per year). The incidence rate for a particular injury category will be based on the formula:

IR = (number of cases x 200,000) divided by hours of employee exposure.

MSHA will develop data respecting injury severity using days away from work or days of restricted work activity and the 200,000 hour base as criteria. The severity measure (SM) for a particular injury category will be based on the formula:

SM = (sum of days x 200,000) divided by hours of employee exposure.

Section 50.41 states:

> Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

The preamble to the proposed rule at Section 50.41 sets forth the purpose of this regulation and explains what MSHA (then the Mining Enforcement and Safety Administration ("MESA")) may request and the importance of cooperation with these requests:

> Section 50.41 requires operators to allow MESA to inspect or copy any information the agency thinks may be relevant and necessary for verification of reports or for determination of compliance with Part 50. In effect, it allows MESA to copy company medical records, employment records, and other company information.
>
> MESA believes that this provision is necessary if it is to be able to develop epidemiologic data essential to development of effective health standards. It is also necessary if MESA is to be able to discover instances of intentional violation of statutory or regulatory requirements. It will allow MESA to control the data flow, rather than depend upon operator filtered records. 42 Fed. Reg. 55569 (1977).

The preamble to the final rule addressed privacy concerns and the need for verification:

> The patient-physician confidentiality privilege is not absolute. Where disclosure of patient data is related to a valid purpose, disclosure has been held not to be violative of privacy rights. It is questionable whether employers have standing to assert employees' privacy rights and significant that no miner or representative of miners has objected to §50.41.
>
> Without inspection of records beyond those required to be kept it is impossible to verify the required records. The Secretary's power to acquire information related to his functions under the Coal Act and the Metal Act is not limited to any particular records. Section 111 (b) of the Coal Act and § 13 of the Metal Act explicitly authorize analysis of other information related to his functions, and only the Secretary, subsequent to inspection and copying, can determine relevance…42 Fed. Reg. 65535 (1977).

ARGUMENTS

Contestants contend, first, that the Act and MSHA Regulations do not require mine operators to maintain and/or provide access to the medical and personnel records demanded by the audit. Further, they contend that the heavy-handed, improper and unlawful attempt to gain access to highly private and confidential information was an abuse of executive authority. Third, they assert that MSHA has not engaged in the necessary notice and comment rulemaking procedure to permit such arbitrary, wholesale, warrantless, and broad and burdensome requests for hundreds of thousands of pages of records. Fourth, they argue that there is a constitutionally protected expectation of privacy in records not explicitly required to be kept by law, as well as legal record keeping obligations, and potential liability of the company under federal and state laws. Thus, due to the foregoing reasons, they contend that the citations and orders issued to Willow and Air Quality should be vacated.

The Secretary contends, in effect, that the plain meaning of the statutory and regulatory language, and Court precedents, permit MSHA to access relevant and necessary records even if they are not specifically required to be kept by the Act. Second, the regulations currently in effect and applicable to audits implement the statutory mandate and provide for verification of compliance with the reporting requirements, so no further rule making is required. Third, the audit request is limited to information regarding reportable, work-related injuries and illnesses and time and attendance data for a specific time period, and there is no reasonable expectation of privacy in such records. Fourth, the requirements of Part 50 are important to MSHA's mission of improving mine health and safety; compliance with the reporting requirement cannot be verified without the requested records. Finally, she argues that because of the foregoing, violations of section 50.41 exist and, therefore, the citations and orders issued are valid.

QUESTIONS PRESENTED

While the issue to be decided is whether the citations and orders written to each of the mines are valid, there are several questions for consideration:

-Are the medical, personnel, and timesheet records sought by the UAR relevant and necessary to determine compliance with the reporting requirements of the regulations?

-Does the Secretary have the authority to request medical and employment records and other company information pursuant to an audit request under the governing statutes and Part 50 of the regulations?

-Does the UAR impose an unreasonable burden upon the operator?

DISCUSSION

Reporting accidents, injuries, and illnesses occurring at a mine is a well-known and long-established requirement under the Act and the Part 50 regulations. 30 C.F.R.

§50.20. Definitions and instructions for reporting are provided in Sections 50.2(e)-(f), 50.20-3. The 7000-1 form is to be mailed to MSHA within ten (10) days of the accident, injury, or illness. MSHA then uses this information, in combination with the 7000-2 form, which is a quarterly calculation of the hours worked by each employee at the mine, to determine the mine's incidence rate and severity measure. These numerical indicators quantify a mine's overall safety record and may be used to objectively view a particular mine's record in comparison to national averages.

The IR for a particular injury category is calculated by multiplying the number of reportable incidents and the coefficient 200,000, and dividing that number by the total hours of employee exposure. The SM for a particular injury category is calculated by multiplying the total number of missed and restricted duty workdays and the coefficient 200,000 and dividing that number by the total hours of employee exposure. The incidence rate is important in that it gives an overall picture of the safety record of the operator. *Energy West Mining Company*, 15 FMSHRC 587, 591 (Apr. 1993). Knowing the prevalence of specific types of injuries and their usual severity allows for more efficient allocation of agency resources in developing strategies not only for enforcement but also for training with the goal of improving the health and safety of miners.

The responsibility for reporting via the 7000-1 and 7000-2 forms at Willow and Air Quality specifically belongs to the Safety Manager at the mine, who appears to be in the best position to determine if a particular incident is reportable. However, the record is not entirely clear as to how the Safety Manager learns of each and every injury or illness, whether reportable or not.

Mike Baize, Safety Manager at Willow, testified that he is responsible for the reports of injuries, coal production, and average [number] of employees. Baize receives information from the employee's supervisor, who fills out the initial report of injury. He might also get a note from a doctor regarding return to work or restricted duty. Any medical records are turned over to the Human Resources Department ("HR.") Tr. 116-118. He stated that he was not privy to payroll, personnel, medical or Worker's Compensation files. Tr. 101, 114. However, should he need information, he could ask HR for return to work information and the nature of an employee's injury or illness. Tr. 114, 116.

Michael Middlemas, Manager of Health and Safety at Air Quality, testified that he held the same position and had the same responsibilities as Baize. Tr. 124,125. Middlemas testified that the only verification of the information on the 7000-1 and 7000-2 forms was essentially whatever information he put on the forms. Tr. 136, 137.

Chad Barras, Safety Director for both mines, testified that he had prior experience at another mine preparing the 7000-1 and -2 documents, and with Part 50 reporting. Tr. 143,144. He stated that the foreman initially filled out the injury report, and the Safety Manager would follow up with the foreman or the employee regarding days off and return to work or restricted duty. Tr. 149-151.

Robert Grossman, Senior Manager of Human Resources at Willow, and before August 2010, in a similar position at Air Quality, testified that he had the responsibility for employee and union relations, payroll, benefits, and worker's compensation. His department maintains medical files, personnel change actions, payroll deduction information and vacation and other leave information. Tr. 52-55, 63.

On direct examination, Mr. Grossman testified:

> Q. …Within your knowledge, does the Safety Department monitor those sets of records that you've just described?
>
> A. No.
>
> Q. Do they have general and ready access to those records?
>
> A. No.

Tr. 55, 56

Grossman further testified that payroll records and timesheets had not been provided to MSHA, and he decided that the medical records request, item no. 5 of the UAR, would not be provided. Tr. 64, 66. In addition, he testified that even if given weeks to produce the requested records, he would not provide them. Tr. 90.

The testimony of the safety officials of the mines illustrates an important point. The Safety Manager, the person with the responsibility to submit the reports to MSHA, must first be informed of an accident, injury, or illness of an employee. The flow of this information is generally from the foreman, but the Safety Department may also receive medical documents, which are turned over to and kept by HR. The Safety Manager may follow up with the foreman or employee to complete the information to be reported, but does not have access to the various medical files safeguarded by HR. To the contrary, the time sheets, payroll records, worker compensation records and medical documents of all types are in the exclusive possession and control of HR and are essentially "off limits" to the Safety Manager and all other personnel. Tr. 55,65,74,75,77,91, Ex. C-K. No evidence was produced at the hearing to suggest that HR would take the initiative to provide relevant injury or illness time off information to the Safety Department.

Considering the volume of medical information that no doubt flows into HR, but not available to the Safety Manager, there is at least the potential for relevant events to go unreported. In addition, should the foreman or the employee fail to initiate a report to the Safety Manager, it appears likely that an otherwise reportable event would escape the notice (and hence the reporting responsibilities) of the Safety Manager. The resulting lack of complete reporting could, of course, be inadvertent or unintentional. But the result is the under-reporting of information needed by MSHA to discharge its duties and

responsibilities to compile and report incidence rates and severity measures as well as manage the allocation of agency resources.

Over-reporting would also result in inaccurate information and misallocation of resources. The mine would appear less safe than it actually is, and this could result in increased inspections. However, this would rarely be the concern to be addressed. On the other hand, there would be incentives to under-report injury and illness information to MSHA.

If the total number of reportable incidents is under-reported, a mine, obviously, will appear to be safer than it actually is. If the incidence rate and severity measure are artificially low, an unsafe mine may be able to avoid enhanced MSHA scrutiny. Further, an elevated severity measure is one criterion in the initial screening for establishing a "pattern of significant and substantial violations." 30 C.F.R. 104.2(b)(3), Ex. G-4. Once this pattern has been established, the mine may be subjected to enhanced penalties and possible forced shutdowns. 30 C.F.R. §104.4. If given the power to solely control the information flow between itself and MSHA, an operator possesses incentives to constrict that flow and under-report incidents at the mine.

The purpose of the Part 50 regulations is to implement MSHA's authority not only to investigate but also to obtain and utilize information pertaining to accidents, injuries or illnesses occurring or originating at mines. 30 C.F.R. §50.1. In order to develop effective health standards, control the data flow, and discover violations, MSHA is allowed to inspect and/or copy any information the agency thinks may be relevant and necessary to determine compliance with reporting requirements. This includes medical records, employment records, and other company records. 42 Fed. Reg. 55569, 65535 (1977), 30 C.F.R. §50.41. Under §50.41, it was intended that MSHA would not depend on operator-filtered records. *Id*. Forms 7000-1 and 7000-2, the only part of the audit request complied with by the mines, are operator-filtered records. Tr. 79. Without the cooperation of the operator, there can be no effective, independent verification of the information submitted to MSHA.

The suggestion advanced by the Contestants that MSHA inspectors would have the authority to interview miners with visible signs of injury could not serve to verify complete and accurate reporting. Tr. 147, 152, 153. This suggestion is contained in a MSHA handbook, where it is also stated that examination and comparison of state workers' compensation records to the MSHA reports (7000-1, 2 forms) may be appropriate. Page 43, Metal and Nonmetal General Inspection Procedures Handbook, No. PH09-IV-1 (Oct. 2009).

Peter Joseph Montali, Acting Director of Accountability for MSHA, testified that the same audit request, the UAR, was sent to all 39 mines audited. Tr. 28. Mr. Montali stated that the information reported on the 7000-1 and 7000-2 forms is used to determine the national incidence rates and averages, which can be compared to the rates at a particular mine. Tr. 19, 20, 22, 23. In a similar manner, the severity measure can also be

calculated and compared. In the affidavit of record, Ex. G-1, Mr. Montali reported he had prior experience with Part 50 requirements. He pointed out that the medical records requested by the audit are limited to accidents, injuries, and illnesses that occurred at the mine or may have resulted from work at the mine. Also, he indicated that the payroll and time sheet records were only to verify the total number of employees and the total hours worked, as reported on the 7000-2 form. As to the various medical records, including the worker's compensation filings, Mr. Montali noted that these are cross-referenced with the 7000-1 forms submitted by the mine to verify proper and accurate reporting of all required information, including permanent total or partial disability, days away from work, restricted work activity, date of return to full duty, or no lost time. The drug-testing documents are limited to tests taken after an accident-causing injury, and the medical claims forms are limited to a determination of whether a particular illness would fit the definition of an "occupational Illness". *Id*.

It is the operator who posses the means to ensure complete and accurate reporting. Absent an audit of company records, MSHA must rely solely on the information provided by the operator's Safety Manager. If the company does not cooperate in the process, there can be no assurance that the safety and health information compiled by MSHA is correct.

In summary of the above discussion, the undersigned does not consider it to be an overstatement that the complete and accurate reporting of accidents, injuries, and illnesses occurring at mines is critically important to the mission of MSHA to protect the health and safety of miners. "The health, safety and the very lives of coal miners are jeopardized when mandatory health and safety laws are violated." *Youghiogheny and Ohio Coal Company v. Morton*, 364 F.Supp. 45, 50 (1973). From the stated intent in the promulgation of 30 C.F.R. §50.41 it can be found that it is not what the operator considers important to report; rather, it is what MSHA thinks is relevant and necessary to verify reports or determine compliance with Part 50 of the regulations. It follows, then, that the particular records sought by the MSHA audit are relevant and necessary to verify compliance with <u>all</u> reporting requirements. Testimony confirms that the records are either maintained by the mine or a third party, or stored, but not destroyed. Tr. 83 ,85.

<u>FINDINGS AND CONCLUSIONS</u>

Commission precedent in this area is rare and does not address the specific set of facts in the instant case. In *BHP Copper*, 21 FMSHRC 758 (July 1999), a fall of ground caused the death of one miner and the injury of another. *Id*. at 759. While MSHA inspectors were allowed to interview several BHP employees, BHP would not provide the phone number and address for the injured miner who had just been released from the hospital, stating that the information was confidential. *Id*. In denying the contention of the operator, the Commission explained that the Secretary has broad authority under the Act to investigate mine accidents and the operator may not impede that investigation *Id*. at 765-766. The Commission also rejected the argument that the Secretary must seek injunctive relief under Section 108 of the Act. *Id.* at 766.

A second, older Commission case is *Peabody Coal Company*, 6 FMSHRC 183 (Feb. 1984). Here, an inspector was refused access to accident reports because the operator had already filed them with MSHA. *Id*. at 185. Peabody argued that because this inspection was of a "type so random, infrequent, or unpredictable that the appellant, for all practical purposes, had no real expectation that its property would from time to time be inspected by government officials." *Id*. Further, it asserted that, in order for MSHA to inspect, it must obtain a warrant. *Id*. In disagreeing with the operator, the Commission found that a search warrant was not required and since the Act required the operator to maintain the records of accidents for five years there was no realistic expectation of privacy in them. *Id*. at 186.

Although these Commission cases involve conflicts over information contained in the operator's records, this is where the similarities end. No accident has occurred in the instant case; rather, MSHA is conducting audits. MSHA is requesting documents to verify that no accident, injury or illness has gone unreported, not investigating the facts and circumstances surrounding such an incident. In this respect, neither *BHP Copper* nor *Peabody* specifically addresses the questions raised by the compliance audit at hand.

In *Sewell Coal Company*, 1 FMSHRC 864 (1979)(ALJ), the Administrative Law Judge ("ALJ") held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id*. at 872-873. In *Sewell*, a MSHA inspector began an inspection of the foremen's records, accident, injury and illness records and medical and compensation records at the mine. *Id*. at 865. All of this information was contained in personnel records that contained other data as well. *Id*. After the discovery of two instances of failure to report, the safety manager informed the inspector that he would not be permitted to continue the inspection. In characterizing the inspection, the ALJ maintained that Part 50 does not explicitly authorize the warrantless search of personnel files containing medical and other information that may or may not be related to accidents, injuries, and illnesses that are reportable. *Id*. at 873. The ALJ thus held that MSHA could not inspect the private personnel files of a mine, in the absence of a valid warrant. *Id.* at 872-873. The Contestants rely heavily on this decision.

However, the instant case can easily be distinguished from *Sewell*. First, the actions of the MSHA inspectors here do not constitute warrantless searches; rather, they are simply requesting that the operator produce certain documents. Unlike in *Sewell*, the inspector would not be rummaging through the file cabinets or files of the operators.[2] At the hearing, it was acknowledged that no physical access to files was requested. Tr. 184, 185. Each mine operator would search his own files for this information, producing only those records meeting the specifics of the request, thereby limiting the chance that unrelated private information would be released to MSHA.

Second, this was not some wholesale demand that would cause the operator great cost and burden to produce. MSHA's request was for documents related only to those accidents, injuries, and illnesses that occurred while working at the mine or as a result of work at the mine. Moreover, MSHA is only requesting documents that were recorded within the span of one year.

[2] In *Peabody*, the Commission similarly distinguished *Sewell* in this manner.

The request concerns only employees, not family members, relatives, or others; if non-employee medical or other records are maintained at the mine, they would not be required for the audit. Any medical tests or Emergency Medical Transportation ("EMT") records would concern only the employee, and as to drug tests, only those conducted following an accident that caused an injury. Ex. G-1, P. 3, ¶ 15. Family medical leave records involve care given *by* the employee, and not relevant to the audit, since the time off would be reflected in other records used to fill out the 7000-2 form. Tr. 53, 54, 57. In addition, only those employee disabilities occurring at the mine or as a result of work at the mine need be disclosed, and not disability records of non-employees that might be in company files. Tr. 56. Similarly, both insurance claims and worker's compensation information are limited to employees of the mine during the one year period. The timesheet and payroll records are to verify the hours actually worked and reported on the 7000-2 form, Ex. G-1, P. 2, ¶ 10. Banking information, including various deductions from pay, is not needed. When other parts of the statute require the operator to keep records of accidents for a period of five years[3] and the testimony revealed that the types of records sought are maintained and not destroyed, Tr. 83-85, compiling records for only a one year period could hardly be burdensome.

Third, as an ALJ decision, this case does not have value as precedent. Admittedly, if the facts were so similar that they could barely be distinguished, I may have been persuaded to consider its reasoning. However, for the reasons listed above, I find the facts in the instant case to be so distinct, that *Sewell* does not provide guidance and is not controlling.

In the absence of controlling Commission precedent, we turn to the statutes, regulations and case law for guidance. We begin by noting that the Mine Act and the implementing regulations are to be liberally construed as long as the Secretary's interpretation is reasonable and promotes miner safety. *Hanna Mining Co.,* 3 FMSHRC 2045, 2048 (Sept. 1981); *Secretary of Labor v. Cannelton Industries, Inc.,* 867 F.2d 1432, 1437 (D.C. Cir. 1989).

In *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained that when confronted with review of an agency's construction of the statute it administers, a judge must consider two questions. The first is whether Congress has spoken to the issue in question. *Id*. If so, the questions are at an end and the language must be enforced as written. *Id*. If the statute is silent or ambiguous to the issue in question, however, the Court must question whether the agency's answer is a permissible interpretation of the language of the statute. *Id*. In this instance, the agency's interpretation must be reasonable, and if so, it will be accorded deference. "…Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer…." *Id.* At 844.

The same analysis applies equally to the language and interpretation of the Secretary's own regulations. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Utah Power and Light Co.,* 11 FMSHRC

[3] See 30 CFR § 50.21, which requires operators to keep Form 7000-1 after an accident for a period of five (5) years.

1926, 1930 (Oct. 1989); *Consolidation Coal Co.,* 15 FMSHRC 1555, 1557 (Aug. 1993); *Cyprus Emerald Resources Corp.,* 20 FMSHRC 790 (Aug. 1998).

I find there is no need to go beyond the plain language of the statutes and regulations. In Section 103(a)(1)(4) of the Act the Secretary is empowered to obtain and utilize information to determine *"...whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act"*. (Emphasis added). Section 103(h) of the Act broadens the scope of compliance actions by explicitly stating *"[i]n addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary…may reasonably require from time to time…."* (Emphasis added). These statutory provisions create a duty on the part of the operator to maintain and provide records to MSHA for the agency to determine compliance with any requirements of the Act. Hence, there would be a legitimate basis for enforcement of reporting requirements even without the Part 50 rules. *American Mining Congress,* 995 F. 2d 1106, 1109 (1993).

The Contestants argue that the records sought are highly sensitive and private, and granting the Secretary access to them would violate the privacy rights of its employees. Although no one would argue against the notion that medical and personnel records are of a highly sensitive and personal nature, there are certain important interests of the government that override these concerns. MSHA, a public health agency, does have the authority to obtain information to determine compliance with the above cited statutes, and permission from the employees is not required. *United Steelworkers of America, AFL-CIO-CLC,* 647 F.2d 1189, 1241 (Jan. 1981). The disclosure of private medical information to a public health agency is a reasonable exercise of government responsibility over public welfare where it is related to occupational health and safety and does not violate any rights or liberties protected by the Fourteenth Amendment. *Whalen v. Roe,* 429 U.S. 589, 597, 598, 602. Further, and importantly, it may be concluded that the governmental interest in promoting mine safety far outweighs any interest the mine operators may have in privacy. *Youghiogheny* at 51.

Even if the statutes were considered ambiguous, the Part 50 rules are legislative rules. Their publication in 1977 satisfies the requirement that the rules have general applicability and legal effect. *American Mining Congress,* at 1109, 1110. Entirely consistent with the statutory mandate, the agency promulgated regulations, including 50.41, that also spelled out duties of the operator to cooperate in determinations of compliance, *Id.* at 1110, 1111. Section 50.41 of the regulations allows the Secretary *"to inspect and copy information related to an accident, injury or illnesses which MSHA considers…relevant and necessary to a determination of compliance with the reporting requirements of this part."* (Emphasis added). Both the statutory and regulatory provisions are clear in their purpose and intent to grant the Secretary authority to request documents that are not specifically required to be kept under the Act. To find otherwise would be to render these passages meaningless.

Further, as set forth and discussed above, the preambles to the controlling regulation, 30 C.F.R. §50.41, are instructive in that MSHA may request the employment, medical and other

records of the employer. The Secretary is authorized to inspect records in order to determine reporting compliance. The reasoning is that reliance on the information provided in the required forms by the operator itself would do very little to verify and ensure complete reporting. In order to verify compliance, the Secretary must have some control over the flow of information. The power to acquire information was not limited to any particular records, and only the Secretary, subsequent to inspection and copying, could determine relevance. 42 Fed. Reg. 55569, 65535 (1977). The language of these preambles is persuasive.

The Health Insurance Portability and Accountability Act ("HIPAA") created a national framework for health privacy protection while also protecting the rights of consumers to access their own health information. 45 C.F.R. §160.101. Without suggesting that HIPAA in any way extends the Secretary's authority to request records, it is significant from the standpoint of expectations of privacy that it explicitly exempts "[a] public health authority that is authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability." 40 CFR § 164.512. The preamble to the HIPAA regulations specifically lists MSHA as one of the entities included as a public health authority. 65 Fed. Reg. 82624 (Dec. 28, 2000).

Moreover, and in consideration of the Contestant's concerns regarding the possibility of records containing both employee and non-employee information, the safeguards that MSHA utilizes during its Part 50 audits to prevent disclosure of private information are adequate. The agency has established specific procedures that must be followed when handling the records of an operator's employees. These include special filing procedures, locked storage, limited access, safe transportation methods, and an alert that medical information is ordinarily exempt from Freedom of Information Act (FOIA) disclosure. Ex. G-5. While no procedures are fool-proof, these go a long way to ensuring that information will not be disclosed. Considering the Congressional mandate to the agency, the controlling regulations, and the exemption from HIPAA provisions, there can be no reasonable expectation of privacy in the records sought by MSHA.

Having found that the Secretary does have the authority to request the records at issue in these cases, I do not have to rule on the reasonableness of her interpretation of the statutes and regulations. However, given the compelling need to verify reports and determine compliance, I would have found her interpretation reasonable anyway. The request is limited to defined types of documents that are necessary to further her mission to protect the safety and health of miners. She is not requesting a wholesale search of all of the records of the operator, including those that are irrelevant to the goals of the audit.

It follows also from the above discussion, that contrary to the Contestants' arguments, this is not arbitrary, ad hoc rulemaking that violates the necessary notice and comment rulemaking procedures. The Secretary has interpreted "in addition to such records" to broaden the document requesting power that she already possessed. She did not create new powers for herself, as the Contestants contend. Her interpretation further defines that this phrase includes employee time sheets, payroll records, medical records and such other documentation requested as relates to work at the mine. The language of the Act lends itself to this interpretation and,

thus, the Secretary did not engage in arbitrary, ad hoc rulemaking.

In fact, legislative rulemaking has already been accomplished, in 1977, and there is no need for additional rulemaking. The regulatory scheme under Part 50 is adequate for the purposes of the audit. A reasonable interpretation of the statutory language would establish that documents, in addition to those required to be kept under the Act, may be requested by the Secretary from time to time as long as they are relevant and necessary. Specific types of documents or information do not need to be named in either the statutes or the regulations. There is no discernible inconsistency between the UAR and either the Act or the Part 50 regulations. The Secretary did not exceed her interpretation authority under *Chevron* analysis.

The Contestants further argue that the audit request amounts to a wholesale search of private company records that cannot be obtained absent a valid search warrant. The most obvious deficiency in this argument is that the Secretary is not demanding to rummage around in the files of the operator. To the contrary, she is requesting that the Contestants produce the documents for the Secretary. Moreover, the documents to be produced are limited by both content and time. By its own description, the request is not a wholesale search. Even if the UAR is considered to be a warrantless demand for the production of documents, as distinguished from a warrantless search and/or seizure of company files, it still does not violate the Fourth Amendment. It is authorized by law to verify compliance with the Act and regulations and necessary to further a federal interest, the health and safety of miners. Where Congress has allowed the agency access to the records, with the specific language of Section 103(h), in a pervasively regulated industry, there cannot be an expectation of privacy. *Donovan v. Dewey,* 452 U.S. 594, 599, 600 (1981). Neither the 1987 opinion of Associate Solicitor Edward P. Clair nor the recent statement of Assistant Secretary Joseph A. Main is helpful to the Contestants. Since the current audit request is not a wholesale, warrantless search of the operator's files, Mr. Clair actually concludes in his opinion that verification of compliance by a Part 50 audit would be entirely permissible. Ex. C-I, P. 3. Mr. Main's statement suggesting that MSHA should have subpoena powers does not undermine the Secretary's authority to request the production of documents under Part 50.

Finally, the Contestants argue that the information sought is overly broad, burdensome and unreasonable. I have discussed, above, that the audit request is not burdensome. I also find that it is neither overly broad nor unreasonable. The Secretary does not request every documented injury or illness to every miner for a number of years. She is only requesting the documentation of reportable injuries, illnesses, or accidents that occurred while working at the mine or as a result of work at the mine. The UAR is for a lawful purpose. It is limited to the span of one year's time. Moreover, the records listed in #3 and #5 are maintained at the mine in HR or at a known third party. The records are clearly described. Peabody has not established on this record that the UAR is burdensome. In light of the significant limitations incorporated into the audit request, it is not overly broad, burdensome or unreasonable.

I find that the Contestant mines failed to fully cooperate in the Part 50 audit and violated 30 C.F.R. §50.41. I further find that Citations 6670850 and 6670852, as modified, and Orders 6670851 and 6670853 issued to the Willow and Air Quality mines are valid.

ORDER

The valid Citations and Orders issued to the Contestant mines are **AFFIRMED**.

Kenneth R. Andrews
Administrative Law Judge

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